The CHAIRMAN. Gentlemen, the practice of the Society has been to refer all resolutions to the Executive Council, but, after conference with some of our members, it has seemed to me that it would be appropriate to ask unanimous consent to have this resolution put to vote at once. The Chair hears no objection. The Chair will put the question upon the resolution and the preamble that have been read. All in favor of the preamble and resolution that have been read will say "Aye."

(The resolution and preamble were unanimously adopted.)

The CHAIRMAN. Is there any other business now, excepting the order of the day?

The SECRETARY. I think not, sir.

The CHAIRMAN. The next in order is a paper by Mr. Charles Cheney Hyde, of the Chicago Bar, Professor of International Law in Northwestern University, the subject being "Attacks upon Unarmed Enemy Merchant Vessels."

ATTACKS ON UNARMED ENEMY MERCHANT VESSELS

ADDRESS BY CHARLES CHENEY HYDE,

Of the Chicago Bar, Professor of International Law in Northwestern University Law School

May a belligerent warship lawfully attack at sight an unarmed enemy merchantman? It may occasion surprise that a speaker before the American Society of International Law should venture to raise such an inquiry at such a time. The writer shares, however, what is doubtless the view of all here present, that a belligerent warship normally lacks that right. While such a vessel may lawfully attempt to gain control of or destroy all enemy ships not exempt from capture, the law of nations is vitally concerned with the processes employed. It does not sanction the needless sacrifice of life or property.

It is still worth while to observe how the immunity of the merchantman from attack at sight has developed, and again, what conduct, if any, on the part of such a vessel subjects it to treatment such as may be lawfully accorded a public armed ship. Finally, it is important to consider whether the equities of the merchantman are restricted by reason of the nature and limitations of the fighting craft of the enemy.

Long before the European War, nations were agreed that unarmed enemy merchant vessels were in general not subject to attack at sight, and that if they were guilty of no improper conduct, the propriety of

attack or destruction was dependent upon the giving of opportunity for the removal of persons on board to a place of safety. Such respect for human life was, moreover, broadly acknowledged without discrimination between carriers of passengers and freight, and irrespective of the nationality of the persons involved.

In days when privateering flourished the unarmed merchantman was a thing unknown. Ships of commerce did not put to sea without substantial armament. This at times sufficed to enable the possessor to offer prolonged resistance and positive danger to any type of vessel encountered. Consequently there was no reason to deal lightly with a vessel itself capable of initiating hostilities, and possibly alert to do so whenever favorable opportunity presented itself. Dictates of humanity could only urge restraint when at least, apart from other considerations, the merchantman ceased to be a source of danger to the naval forces of the enemy. The earliest instructions to American privateers, dated April 3, 1776, authorized the commanders by force of arms to "attack, subdue, and take all ships and other vessels" belonging to the inhabitants of the enemy's country. There was no suggestion that any ships belonging to them should be treated with leniency. As doubtless the entire merchant marine of the enemy was armed, at least defensively, it was logical that the instructions should place all enemy vessels in the same category. The instructions of President Madison to American privateers issued in 1812, stated that "towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members." No discrimination was, however, made in respect to any class of enemy ships, and doubtless none was thought of.

With the abandonment of privateering and the confining of hostilities to public vessels specially adapted for war, the arming of merchantmen became increasingly infrequent because of the helplessness of such vessels in engagements with a warship, which was the only type of craft from which acts of aggression were to be anticipated. The latter, moreover, with its vast preponderance of offensive power and defensive strength, found the merchantman a negligible danger and regarded it rather as an object of prey. Thus the very weakness of the latter became a safeguard, and the unarmed merchantman gained the right to be called upon to surrender before attack.

Although useful to its own state as a carrier of articles needed for the prosecution of war, the enemy merchantman did not lose the right to demand a signal to surrender before being attacked. Respect for humanity still outweighed the claims of military necessity, a fact which neither

the writings of publicists nor the naval codes of maritime Powers purported to deny.

At the present time an unarmed enemy merchant vessel, such as a trans-Atlantic liner of great tonnage and high speed, although designed and employed primarily for the transportation of passengers and mail, is still capable of rendering incidentally substantial military service as a carrier of war material. Its speed may enable the vessel to outdistance any pursuer and to keep beyond the range of a signal to stop. Wireless telegraphic equipment may offer means of summoning aid whenever needed. The instant destruction of the ship without warning may thus offer the sole means of preventing its escape and the delivery of contraband articles at their destination. The success of the voyage, despite its principal purpose, may serve to prolong the war by adding to the resources of the state to which the vessel belongs. It is not believed, however, that the indirect harm to be wrought in consequence of escape equals that to be anticipated from the deliberate disregard and destruction of the lives of the occupants of the ship. Claims of military necessity still fail to turn the scales of justice.

The unarmed freighter, not so given over to the transportation of war material as to be deemed primarily an instrument of belligerent service, is believed to be entitled to similar treatment. A total absence of passengers does not deprive officers and crew of safeguards which are fairly due noncombatants. Nor does the smallness in number of the individuals whose lives are at stake weaken the equities of the occupants of the ship, unless it is bent on an essentially hostile mission. The slower speed of the vessel as compared with that of the passenger liner, lessens, moreover, the chances of its escape in case of pursuit.

Doubtless the peculiar occupation or sinister conduct of an unarmed merchantman may so strengthen the equities of an enemy warship as to cause the claims of military necessity to outweigh every other consideration. The cases falling within this category do not, however, weaken the principle that the carrier is normally exempt from attack at sight, or that the enemy vessel which fires upon it without warning assumes the burden of showing that its victim has forfeited the right to exemption from such treatment.

The question presents itself whether the right of exemption is forfeited by the attempt of the merchantman to escape capture. All will agree that any form of resistance by such a vessel destroys its immunity. This is true when, for example, an unarmed surface craft attempts to ram its assailant. It is also true, according to the Department of State, when an

armed merchantman, prior to a summons to surrender, and yet aware of the approach of an enemy warship, uses its armament to keep the enemy at a distance.

The attempt of an unarmed merchantman of any type to escape, either by flight on the surface or by submerging, prior to a signal to surrender or to come to, and with the obvious purpose of keeping beyond the range of a recognized pursuer, does not authorize the latter to attack the vessel without warning. The situation is otherwise, however, when the vessel, although unarmed, is a public ship, or one engaged primarily in a public service connected with the prosecution of the war.

Any belligerent vessel of any kind or type exposes itself to instant attack, if after a reasonable summons to surrender, it persists by any process, in an attempt to escape. After the receipt of such a signal or following the abandonment of flight, in consequence thereof, the attempt to summon aid by wireless telegraph or other process, is analogous to resistance and justifies the enemy in taking summary steps to cause its discontinuance. These might produce a difficult situation, in case the call for aid brought to the scene an armed ship endangering the safety of the enemy or frustrating its attempt to effect a capture. In such a situation, however, the Department of State appears to hold that the mere effort to secure assistance should not alter the obligation of the warship seeking to make the capture to respect the safety of the lives of those on board the merchantman.

As between opposing belligerents, the employment of ruses untainted by perfidy, such as the use by an unarmed ship of a neutral flag in order to prevent the detection of its nationality, does not wholly deprive the user of the right to enjoy an immunity from attack at sight which it would otherwise possess. Thus, the mere flying of such a flag by a vessel still recognized by the enemy as a belligerent unarmed merchantman would not suffice to justify an attempt to destroy it without warning. Even if an opposing warship were in fact deceived by the device, and in consequence failed to avail itself of its power to make an effective summons to surrender, it would not be justified if again sighting the vessel in endeavoring to prevent its escape at all hazards, and to that end, if no other means were possible, in attacking it without warning. Inasmuch as the use of a false flag by an unarmed belligerent ship is commonly for the purpose of aiding escape by flight rather than of offering resistance, the attempt to deceive, whether successful or unsuccessful, is neither perfidious nor harmful to the pursuer. Detection should not, therefore, excuse attack without warning upon the ship resorting to such a ruse.

The situation is otherwise, however, where the use of the flag by an unarmed ship is for the purpose of alluring a hostile cruiser into waters where it will be subjected to attack by other vessels, or its safety endangered by unknown mines. In such a case it is believed that the vessel resorting to the ruse may be fairly attacked without warning upon the discovery of its design.

The present war has given rise to inquiry whether the existing rules of maritime war with respect to attacks upon unarmed enemy merchantmen are applicable to the operations of submarine naval vessels.

It will be recalled that on February 4, 1915, the German Admiralty announced that the waters surrounding Great Britain and Ireland, including the whole British Channel, were to be deemed a war zone, and that on and after the 18th day of February, 1915, "every enemy merchant ship" found in the zone would be destroyed "without its being always possible to avert the dangers threatening the crews and passengers on that account." Lack of time prevents discussion of our diplomatic correspondence with Germany which immediately ensued.

On May 7, 1915, the S.S. *Lusitania* was torpedoed without warning by a German submarine off the Old Head of Kinsale, Ireland. The vessel sank within twenty minutes. Eleven hundred and ninety-eight men, women, and children were drowned, of whom one hundred and twenty-four were American passengers. The cargo was a general one of the ordinary kind, consisting in part, however, of about five thousand cases of cartridges. The ship was unarmed; it carried no masked guns or trained gunners, or special ammunition. It was not transporting troops, and it had violated no laws of the United States. On August 19, 1915, the British liner *Arabic* was torpedoed by a German submarine off the coast of Ireland, and on March 24, 1916, the French channel S.S. *Sussex*, while crossing from Folkstone to Dieppe. Both were unarmed passenger ships, attacked without warning, and on board of which American passengers were among the victims suffering injury or death.

These deplorable acts, arousing deep indignation throughout the United States, presented the following problems: whether undersea war vessels could and should be subjected to the existing rules respecting attacks on unarmed enemy merchantmen; whether, even if the foregoing question were to be answered affirmatively, Germany had a valid excuse for not observing them by reason of alleged excesses of its enemies; and whether knowledge of the presence of neutral passengers on board belligerent merchantmen altered the normal obligations of the opposing submarine.

In its first note to Germany after the destruction of the *Lusitania*, the

Department of State declared it to be a "practical impossibility" to employ submarines against enemy commerce "without disregarding those rules of fairness, reason, justice, and humanity, which all modern opinion regards as imperative." Thus it was said to be practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo and "to make a prize of her"; that if they could not put a prize crew on board of her, they could not sink her without leaving the several occupants to the mercy of the sea in small boats; and hence that manifestly submarines could not be used against merchantmen "without an inevitable violation of many sacred principles of justice and humanity." On July 21, following, the Department declared, however, that the previous two months had indicated that it was possible and practicable to conduct submarine operations in substantial accord with the accepted practices of regulated warfare, and that the whole world had looked with interest and satisfaction at the demonstration of that possibility by German naval commanders. Finally, after the series of lamentable events, culminating in the torpedoing of the S.S. *Sussex*, the Department renewed the stand which it had taken at the outset, to the effect that the use of submarines for the destruction of enemy commerce was of necessity "utterly incompatible with the principles of humanity, and the sacred immunities of noncombatants." Nevertheless, the United States appears to have demanded and expected an abandonment of the existing "methods of submarine warfare" rather than the use of undersea vessels as commerce destroyers.

If the limited means possessed by a submarine of ascertaining, by any process, the identity or nature or national character or movements of any ship encountered, necessarily involves danger of indiscriminate attack at sight upon public or private vessels, armed or unarmed, warships or passenger liners, it would be difficult to justify under plea of military necessity the use of such an instrument of naval warfare, unless it be acknowledged that a belligerent may employ any means of reducing its foe. Maritime states have not as yet agreed thus to subordinate the claims of humanity, or so to sanction wanton disregard of unoffending human life. It is not to be anticipated that they will tolerate the removal from any form of war vessel of the duty to apprise itself as to the nature and character of enemy ships encountered as a condition precedent to lawful attack upon them.

If a submarine encounters an unarmed enemy merchantman, normally immune from attack at sight, and not guilty of conduct forfeiting that privilege, no right to attack without warning is apparent. Nor is any to

be derived from the difficulty which the former may anticipate in providing for the safety of the occupants of the latter. After giving adequate warning, no destruction of the vessel should be attempted until its occupants are assured of at least a temporary place of refuge. The life-boats offer at best, as the Department of State has indicated, "a poor measure of safety." On numerous occasions great loss of life has ensued when the occupants of a merchantman have, pursuant to orders, endeavored to take to the boats.

The cases of the British ship *Falaba*, destroyed by a German submarine March 28, 1915, the Italian ship *Ancona*, attacked by an Austrian submarine November 7, 1915, and that of the American ship *Healdton*, torpedoed March 21, 1917, may be cited as instances. Recourse to the boats in a heavy sea must always be attended with great danger. Moreover, a life-boat, even if it keeps afloat, affords slight protection from exposure to those long obliged to depend upon it as their sole place of refuge in inclement weather or on an unfrequented sea. Hence the reasonableness of causing passengers and crew of an unoffending merchantman to put to sea in open boats seems to depend upon the presence of special circumstances indicative of the absence of those dangers usually attending such procedure.

Mere incapacity of a naval submarine to offer a place of refuge on its own decks does not justify a disregard of the safety of the persons aboard the enemy merchantman that has surrendered or obeyed a signal to stop. It rather indicates a limitation of the right to destroy the ship until by some process the safety of its occupants has been assured. Should a small surface craft such as a torpedo-boat destroyer, or a naval vessel even more diminutive, fall in with an enemy passenger liner having two thousand persons aboard, the inability of the former to offer a place of refuge to a majority of those persons, or to spare an adequate prize crew, would not in itself be deemed to justify the demand that the occupants of the liner take to the boats, or otherwise jeopardize their safety, in order to permit the destruction of the vessel on which they were carried. The submarine is subject to the same duty.

In a word, the United States is believed to have taken an impregnable stand in its demand that the normal obligation of a warship not to attack at sight an unarmed enemy merchantman is applicable to undersea vessels, and that hence the right, if any, to employ them as commerce destroyers depends upon the power and disposition of those controlling them to respect that obligation.

In its official correspondence Germany did not assert that the rules of international law respecting the treatment due to unarmed merchantmen

were inaccurately enunciated by the United States, or that submarine vessels were incapable of observing them. It was sought to excuse the practices of such vessels on the ground that the conduct of Great Britain was in such sharp defiance of international law that Germany was obliged to have recourse to a ruthless procedure by way of so-called retaliation. It is believed that the sufficiency of this plea depended upon proof that the enemies of Germany were in fact subjecting German merchantmen to treatment similar in kind to that which British and French vessels were being accorded. If British submarines had been attacking without warning German unarmed merchantmen in any zone of hostilities, a situation would have arisen which the United States might have had great difficulty in meeting. The British acts, of which Germany made complaint, were, however, of a widely different character. They did not contemplate the destruction of noncombatant human life on unoffending and unarmed vessels, and hence offered no adequate excuse for the commission of such acts by the enemy. Germany, therefore, owed a duty to every British subject aboard the *Lusitania* and on other British ships of similarly irreproachable conduct, which no acts on the part of the state to which those vessels belonged had served to lessen. It may be observed, parenthetically, that the presence of neutral passengers on board the *Lusitania* did not alter the duty which Germany owed to that vessel. The obligation not to sink it at sight was one which was due an unarmed merchantman, irrespective of the nationality of its occupants. If the Cunard Company was at fault in encouraging neutral passengers to embark on the ill-fated ship, that fault lay in the failure to warn them that German submarines might not be deterred from wanton disregard of the duty not to sink an enemy merchantman at sight, by even the lawful presence on board of neutral passengers.

In a recent note from Austria-Hungary it is suggested that the necessary warning to a merchantman might be made before the departure of the vessel from port. This would imply that a belligerent has a right to free itself from every duty which the law of nations has imposed upon it with respect to noncombatant and unoffending human life, by giving notice that it will resort to every means in its power to capture or destroy even the unarmed merchant marine of the enemy. In response it may be said generally that the mere giving of notice can never justify lawlessness. To be more specific, however, a belligerent lacks the right to attack and destroy unarmed enemy merchantmen save under conditions which the law of nations, inspired by the dictates of humanity, has definitely established. It cannot modify those conditions at will.

It is unnecessary here to discuss the argument employed by the United States, before it became a belligerent, to combat the German pretensions. It suffices to note that the retaliatory plea was deemed inadequate and unresponsive to the demands of a neutral nation.

The most significant and satisfactory aspect of our diplomatic correspondence with Germany and Austria-Hungary is believed to have been the admissions drawn from both as to the duty of a belligerent, at least under normal circumstances, towards the unarmed merchant vessels of the enemy. On December 29, 1915, the Austro-Hungarian Foreign Office informed Mr. Penfield, in connection with the *Ancona* case, that:

> As concerns the principle expressed in the very esteemed note that hostile private ships, in so far as they do not flee or offer resistance, may not be destroyed without the persons on board having been placed in safety, the Imperial and Royal Government is able substantially to assent to this view of the Washington Cabinet.

The assurances given by Germany May 4, 1916, the withdrawal of which, on January 31, 1917, led to the severing of diplomatic relations by the United States on February 3, last, contained the following statement:

> In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.

Here is proof that the rights of the unarmed enemy merchantman are recognized by international law, and that the duty with respect to warning and the saving of human life is as applicable to the submarine of the opposing belligerent as to its surface fighting craft. It is an acknowledgment that the United States has correctly enunciated the law. Whether it is to be maintained or abandoned depends upon the extent of the sacrifice which our country and the Powers with which it is happily in alliance are willing to make. The intensity of our own indignation at defiance of the law of nations is measured by the force we use to compel respect for it. For those of us who were born on this soil it is hard to believe that America is less sensitive to injustice than Europe, or less inclined to fight for principle. Those Americans who to-day, depressed by the conduct of our enemy, declare that international law no longer exists, misjudge the temper of this nation and forget its past. It is unthinkable that the United States, however reluctant to enter the war, will regard peace a blessing, until it has exhausted, if need be, its whole strength, to gain assurance

from Germany of the principle that it is entitled to live its life as an independent state when and as long as it respects the law of nations, and no longer.

The CHAIRMAN. The subject of the paper that has now been read is open for discussion from the floor. Ten minutes is the limitation of time. The Chair does not see anyone rising to speak. If Mr. Scott will kindly take the chair, I will be glad to say a few words on the subject.

(Mr. Scott thereupon took the Chair.)

Mr. WHEELER. In the very extraordinary circumstances in which this nation is placed, we need to recur to first principles, and to the history of this law respecting which we have had such an enlightening statement.

In that book, which is the most common in all our households, the Bible, in the prophets of the Old Testament, in some accounts, by allusion, at least, in the New, and in historic books and songs, may be found detailed accounts of the way in which wars were waged two thousand years ago and more. Those accounts might, with a little change of atmosphere and name, be reproduced in the story of the invasions of Belgium and Northern France and Serbia and Armenia, and in the conduct upon the seas of the German submarines, of which you had a statement this morning. Ever since there came to be any mutual discussion and conference by nations, in what we have come to call international congresses and conferences to form the body of international law, there has been an endeavor by the different nations to mitigate the ferocity of warfare. It is the fundamental principle of our Society, and we have adopted that from frequent statements of our greatest tribunal, the Supreme Court of the United States, that these mutual agreements among nations have become a body of law that is binding upon them, and will be, on all appropriate occasions, enforced by the courts. One of these laws is that which has been stated by our friend from Chicago, Mr. Hyde; that is to say, that it shall not be lawful to sink an unarmed merchantman, even of a belligerent, without warning and without putting her passengers and crew in a place of safety.

Now, it is fundamental that if a grant of power is given, conditional upon the exercise of certain acts, the power is inoperative unless those acts are performed. If I deliver a deed to become effective upon the performance of certain conditions by the grantee, that deed is inoperative until he performs those conditions. For the grantee to come forward and say, "I cannot perform those conditions; give me the deed; if you do not give it to me, I will take it and enter forcibly into the possession of the land," why, such a procedure is precisely analogous to the conduct of the German

Government in this submarine warfare, and it would not be tolerated in any court in the civilized world. Therefore, the excuse that has been so frequently brought forward in the diplomatic correspondence, that it is impracticable for the submarines to comply with the law, is simply a statement, though not so intended by the persons who made it, that they ought not to commit the acts, the performance of which acts was conditional upon compliance with certain preliminary activities which they say they cannot perform. Probably they cannot. It is obvious that a submarine cannot, itself, save the crew and the passengers. It is obvious that it cannot carry persons enough on board to put a prize crew on board the captured vessel, in accordance with the old practice, and send that vessel in for condemnation. Therefore, it seems to me, it is a necessary conclusion — and we ought constantly to dwell upon that — that they have no right to do the act which they are claiming to do.

My next proposition is this, that the United States of America more than fifty years ago, deliberately, and without any serious dissent, took the ground that killing a person in violation of the laws of war was murder, and that a commission from a belligerent was no justification. It is not necessary for me to do more than allude to the atrocities which were practiced by Captain Wirz, who was himself a German-Swiss. The absence of restraint in war seems to be in this blood. It was in him. It has always been to me a great satisfaction that these crimes, which caused so much natural and just indignation in the North, were not committed by one of our people; but they were committed by this German-Swiss, who was in command at Andersonville, and who did have a commission from the Confederate Government. He was captured, and he was put on trial in this city, before an absolutely learned and impartial court. He had the assistance of very able counsel, his trial lasted about two months, and after hearing all that could be said, the court decided that his killing, as it was proved he had killed a number of prisoners at Andersonville, in violation of the laws of war, was murder, and he was executed most justly, as I think.

It seems to me that in the extraordinary conditions which have arisen in the last two years and a half, it is the part of mercy, in reference to the future, for us very seriously to consider that we should take the ground that the action, for instance, of Otto Steinbrink, who, it has just come to light, was the captain who commanded the submarine that sank the *Lusitania*, by first firing at her and then, when he found she did not sink, firing again, was murder. It seems to me clearly that it was. I should, for my part — and I have taken the liberty of suggesting that to the authorities — say that it is right and just that an indictment should be found against

him, and after the war, if he can be seized, he should be put on trial. As a lawyer, I am convinced that under the laws of this country, it would be the duty of a jury, if these facts be proved, to find him guilty. I cannot think that in the contingency which may occur — that there may be other wars — there will be any more mercy shown, unless there shall be some condign punishment for the crimes committed in this.

That, gentlemen, is the point I desire to make, because I want to emphasize that it is not for retribution that such acts of justice are undertaken by a government. Retribution, in a proper sense, is in the hands of the Almighty. The object of human punishment, as I see it, is to prevent, as far as we can, the commission of such offenses in the future. Certainly human justice is very inadequate if, when crimes are flagrantly committed, without excuse and without justification, some attempt, at least, is not made to punish offenders as a warning to future evildoers.

(Mr. Wheeler thereupon resumed the Chair.)

The CHAIRMAN. If there is no further discussion upon the subject of Mr. Hyde's paper, we will take up the next branch of our program this morning, "Some Economic Aspects of International Organization," and on that subject we will have the pleasure of hearing from Mr. Lester H. Woolsey. That is a great name in international law, and it is always a pleasure to hear from a Woolsey on international law.

SOME ECONOMIC CONSIDERATIONS OF INTERNATIONAL ORGANIZATION

ADDRESS BY LESTER H. WOOLSEY,

Solicitor for the Department of State

On account of my connection with the Department of State, it is appropriate that I should have assigned to me a colorless topic relating to the economics of international relations, for in discussing this subject, I shall not be expected to throw any light, even if I could, upon the intricacies of the relations of the United States with the belligerent Powers during the last thirty months. I had intended to study in some detail the effects of the present war upon the economic relations of states, particularly the effects of the blockade measures of the opposing belligerents. But, owing to the pressure of my duties in the State Department, particularly during the last few months, in the course of which the United States was steadily progressing to the state of war declared on April 6th, I have been unable to